

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 15-0416 WHA

Plaintiff,

v.

**REQUEST FOR BRIEFING ON
RULE 29 AND EVIDENTIARY
VIOLATION**

ENZO CESTONI,

Defendant.

By **NOON ON APRIL 19, 2016**, both sides are requested to address whether an acquittal should be granted on Count 1 of the superseding indictment. Specifically, the motion should address whether a reasonable jury could find, on this record, that the government proved, beyond a reasonable doubt, that the Instagram photo at issue was taken on or about July 4, 2015. The motion should also address whether a reasonable jury could find that the government proved, by a preponderance of the evidence, that the alleged offense occurred in the Northern District of California.

Furthermore, the Court is disappointed that the government violated a direct Court order during trial. On at least three different occasions, the Court made explicitly clear to the government that if it was going to survey all Instagram photos posted by defendant to find those with a date visible in them (in order to prove defendant had a pattern and practice of posting photos to Instagram shortly after they were taken), then the government would have to include

1 in its survey each and every photo with a date shown therein. Specifically, the Court stated as
 2 follows:

3 THE COURT: . . . The only way I would let you do this would be
 4 to have a qualified witness say the following to the jury: I
 5 reviewed every single photograph and I studied it carefully, and
 6 any time there was some date evident within the picture itself, I put
 7 that to one side; and when I got through to the end -- I'm making
 8 this part up now -- all seven -- there were only seven in that
 9 category, and all of those seven were close in time to when they
 10 were posted (April 4 Trans. at 5).

11 * * *

12 THE COURT: Fine. Now, he better have reviewed every single
 13 one of them on there; and when Ms. Leonida busts him, blows him
 14 out of the water because she finds one that contradicts, I'm just
 15 going to say, you know, good for her. So he better had done a
 16 good job.

17 MR. DAWSON: We understand, Your Honor.

18 THE COURT: And he needs to identify the ones -- the longest --
 19 furthest-away date so that the jury can have the benefit of all that
 20 info. And you can use one nonprejudicial illustrative exhibit
 21 (April 5 Trans. at 2).

22 * * *

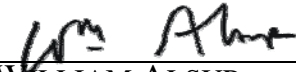
23 THE COURT: You need to make sure that the witness has
 24 reviewed every single item and tell the jury how many there are,
 25 because, you know, the fact that it's only seven out of 1200, if
 26 that's true, maybe that proves something, but it's a small sample
 27 (April 6 Trans. at 4).

28 Despite these clear instructions, the government knowingly omitted from its survey a photo
 with a visible date that had been posted to defendant's Instagram. The government's witness,
 FBI Agent Somnhot, testified on direct that there were only seven photographs depicting a date
 anywhere on defendant's Instagram account and that the longest time period between the date
 depicted and the date the photo had been posted to Instagram was eight days. On cross
 examination, however, the defense presented a photo with the date October 24, 2012 shown in
 it, which had been posted to defendant's Instagram account on May 25, 2014, a gap of more
 than 19 months (Defense Exh. HH). This photo appears to have been a memorial to one of
 defendant's associates, a photo card showing his birth date and death date. The government
 attempted to excuse this knowing omission by arguing that this photo had been a "photo within

1 a photo.” Why this circumstance should have mattered remains unclear and at all events
2 violated the fundamental conditions under which the small sample size was permitted in the
3 first place. By **NOON ON APRIL 19**, both sides should address what effect this knowing
4 omission should have on the verdict, and government counsel should address whether they
5 knew that Agent Somnhot had not disclosed this photo in his initial survey.

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7 **IT IS SO ORDERED.**

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9 Dated: April 11, 2016.

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11 WILLIAM ALSUP
12 UNITED STATES DISTRICT JUDGE
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